No. 12873

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

APPELLEE'S PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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APPELLEE'S PETITION FOR REHEARING.

To the United States Court of Appeals for the Ninth Circuit:

Appellee's judgment has been reversed upon the sole ground that the trial Court's conclusion that he was not an independent contractor was not supported by the findings.

It is now apparent that appellee's counsel gave inadequate attention in their brief to what has turned out to be the vital facet of the case. In justice to appellee, and before he is finally deprived of his rights as an honorably discharged veteran, this Court is petitioned to grant a rehearing so that consideration may be given the following points:

I. The decision is in conflict with this Court's most recent opinion on the subject.

II. Although the 80th Congress required the application of common law control doctrines under the Labor Relations and Social Security Acts, the broad coverage of the Selective Service Act was left untouched. The decision is therefore contrary to a sustained legislative policy requiring all persons upon whom a veteran was previously dependent for his regular livelihood to restore him to it upon his return from the service.

III. Two recent Selective Service Act decisions rendered since this case was briefed, give added support to appellee.

IV. When all the evidence is considered as a whole, it is sufficient to support the trial Court's conclusion that appellee was not an independent contractor.

I.

The Decision Is in Conflict With This Court's Most Recent Opinion on the Subject.

Appellee finds it impossible to reconcile this decision of the Court with its *per curiam* decision (Judges Garrecht, Mathews and Bone participating) on June 28, 1948, in the case of *Hearst Publications v. U. S.,* 168 F. 2d 751. That decision stated "on the grounds and for the reasons stated in its opinion (70 Fed. Supp. 666) the judgments of the District Court are affirmed" and thereby held that San Francisco news vendors were "employees"[1] within the meaning of the Social Security Act.

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[1]In *Hearst Publications v. N.L.R.B.* (C. A. 9, 1943), 136 F. 2d 608, a majority of this Court speaking through Judges Stephens and Mathews, had previously pointed out the following characteristics of a news vendor's employment:

1. Profits consisted solely of the difference between the price paid by the news vendor to the publisher and the price paid him by the public.

2. The news vendors assumed all risk of loss by destruction or theft of newspapers.

3. The news vendors dealt in other and often in competing publications.

4. A practice existed among news vendors in buying and selling valuable corners.

5. The news vendors often hired, and paid out of their own money, assistants to help them sell newspapers in their territory.

6. In addition to this, in the case of the San Francisco news vendors, there was a contract between them and the publishers which recited that it was the intent of the parties to maintain a vendor-vendee relationship and not an employer-employee relationship. (70 Fed. Supp. 666-669.)

The opinion of the District Court, adopted by this Court six months after its decision in *Brown v. Luster* (C. A. 9, 1947), 165 F. 2d 181, contains the following language:

> "From these various decisions there evolves at least one principle,—determinative of this cause in favor of the employment status, entirely reconcilable with established common law doctrines as developed and grown to meet new situations, and with the remedial objectives of social security legislation, and which is, at the same time realistically practical. That is, that *any person is an employee within the meaning of social security legislation who is engaged as a means of livelihood in regularly performing personal services which (1) constitute an integral part of the business operations of another; (2) are not incidental to the pursuit of a separately established trade, business or profession,—involving in their performance capital investment and the assumption of substantial financial risk, or the offering of similar services to the public at large; and (3) are subject to a reasonable measure of general control over the manner and means of their performance.* (Citing Matcovich v. Anglim (C. A. 9, 1943), 134 F. 2d 834, and other cases.)
>
> * * * * * *
>
> "It may be, therefore, that ultimately the employee status in service relationships of doubtful nature will be made to depend on the absence of such a separate business or calling and on the presence of some de-

gree of control over the manner and means of performance of the services. In fact, *it seems reasonable to regard persons earning their livelihood performing services for others, who have no established business or profession of their own and who are, in the performance of such services, subservient to the will of others, to be singularly subject to the hazards of unemployment and needy old age.* On the other hand, those protected by capital reserve or equipped with the enterprising characteristics of a free agent, are more favorably endowed with what it takes to combat their own economic ills." (Emphasis supplied.)

The emphasis laid by this decision upon the nomenclature used in the final form of written contract between appellee and appellant corporation is also in contrast to this Court's previous steadfast refusal to give consideration to the newsboys' contract or the taxi-dancers' contract in the *Matcovich* case, *supra.* And in disregarding such contracts, this Court has been supported by *Bartels v. Birmingham* (1947), 332 U. S. 126.

II.

Although the 80th Congress Required the Application of Common Law Control Doctrines Under the Labor Relations and Social Security Acts, the Broad Coverage of the Selective Service Act Was Left Unchanged. The Decision Is Therefore Contrary to a Sustained Legislative Policy Requiring All Persons Upon Whom a Veteran Was Previously Dependent for His Regular Livelihood to Restore Him to It Upon His Return From the Service.

The 80th Congress passed the Labor-Management Relations Act, 61 Stat. 137, P. L. 101, chap. 120, and in so doing amended the definition of "employee" at 29 U. S. C. A. 152(3) to expressly exclude "any individual having the status of an independent contractor."

One of the purposes of this amendment was to overrule the decision of the Supreme Court in *N.L.R.B. v. Hearst* (1944), 322 U. S. 111. (See Conference Committee Report, House Report No. 510, U. S. Code Cong. Serv., 80th Cong., 1st Sess., 1947, p. 1138.)

The 80th Congress next addressed its attention to the Social Security Act and passed the Gearhart Amendment, effective October 1, 1948 (62 Stat. chap. 468, P. L. 642, Sec. 3(d), Vol. 1, U. S. Code Cong. Serv., 80th Cong., 2nd Sess., p. 451).

Concerning this legislative act, the 1950 Annual Survey of American Law, page 243 (N. Y. Univ. School of Law) recently stated:

> "The original law failed to make a precise definition of employee with the result that some courts applied the common law test of control while others developed an 'economic reality' test. This latter in-

terpretation was adopted in 1947 by the Supreme Court in the Silk and Bartels cases. In the following year Congress passed the Gearhart Amendment (62 Stat. 438-39 (1948), amending 26 U. S. C. Secs. 1426(d), 1607(i), 42 U. S. C. Sec. 1301(a) * * * which established the common-law rule as the basis for determining the employment relation. The new statute (1950 amendment) reaffirms this principle but makes exceptions for four groups under specified conditions. These are full-time life insurance salesmen, drivers-agents distributing food and beverages (excluding milk), laundry and dry-cleaning, full-time salesmen soliciting orders from merchants, hotels and similar establishments to be delivered later, and home workers operating under a state license system and with specific instruction supplied by an employer."[2]

However, it is significant that Congress has never attempted by statute to change the "economic reality rule"

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[2]Other recent and illuminating law review articles on the subject are:

"Social Security Status of Real Estate Salesmen Under the Federal Unemployment Tax Act," 18 Geo. Wash. L. Rev. 579 (1950).

"Aspects of Legislative History of the Social Security Act Amendments of 1950," by Wilbur J. Cohen, 4 Industrial Labor Relations Rev. 187, 193.

"Social Security—Taxicab Drivers Held Not Employees Under Social Security" (1949), 35 Va. Law Rev. 646.

"Unemployment Compensation—Commission Agents Held Employees Under Unemployment Compensation Act (1949), 35 Va. Law Rev. 802.

"Social Security: Employment Relationship: Who Are Employees?" 3 Okla. Law Rev. (1950) 349.

"Relationship of Employer and Employee—Social Security Act," 24 Notre Dame Lawyer (1949) 578.

See also Annotations on status of "Salesmen," 138 A. L. R. 1413, 160 A. L. R. 713, 10 A. L. R. 2d 369.

A legislative discussion of the Gearhart Amendment is found in Sen. Rep. 1255, Vol. 2, U. S. Code Congressional Service, 80th Cong., 2nd Sess., pp. 1752-75.

applied by this Court and others to the Selective Service Act. (*Dodds v. Williams* (C. A. 9, 1947), 163 F. 2d 724 ("taxi-cab fleet operator"), opinion by Mathews, J., citing with approval *McMillan v. Montecito Country Club* (D. C., S. D. Cal.), 65 Fed. Supp. 240 ("golf pro"); *Lee v. Remington-Rand* (D. C., S. D. Cal.), 68 Fed. Supp. 837 ("traveling commission salesman").)

At page 38 of his brief, appellee cited decisions from the First, Second, Third, Seventh and Tenth circuits, all of which extended Selective Service Act coverage to commission salesmen. To this list there should now be added a decision from the Fourth Circuit—*Bowen v. Home Beneficial Life Ins. Co.* (C. A. 4, 1950), 183 F. 2d 376.

Mr. Justice Rutledge said in *U. S. v. Silk* (1937), 331 U. S. 704, 721:

> "* * * the balance in close cases should be cast in favor of rather than against coverage, in order to fulfill the statute's broad and beneficial objects."

Following this in *Bartels v. Birmingham* (1947), 332 U. S. 126, 130, Mr. Justice Reed said:

> "* * * in the application of social legislation, *employees are those who* as a matter of economic reality *are dependent upon the business to which they render service.*" (Emphasis supplied.)

Appellee respectfully submits that this "economic reality" rule has been allowed by Congress to continue in its application to the Selective Service Act and that such an application is required by the liberal construction rule announced in *Fishgold v. Sullivan Drydock and Repair Corp.* (1946), 328 U. S. 275, 285:

> "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."

III.

Two Recent Selective Service Act Decisions Rendered Since This Case Was Briefed, Give Added Support to Appellee.

A. The first of these is *Travis v. Schwartz Mfg. Co.* (D. C., E. D. Wisc.), decided August 10, 1951, 20 C. C. H. Labor Cases 80,001, where a veteran who had been engaged in the sale of a manufacturer's products on a commission basis was held to have left a position in the employ of an employer rather than in the status of an independent contractor as a "manufacturer's agent," where:

1. He was paid $20,531.22 as commissions for the year immediately preceding his entry into the service.

2. He had been selling defendant's products since 1933 and was paid solely from commissions during all of that time except a period of 18 months in 1934 and 1935 when he was paid in addition a fixed salary of $100 a month while breaking in a new line.

3. Plaintiff paid his own traveling expenses and furnished his own car but the company paid his expenses at conventions which he attended at its direction.

4. The employment by him of an assistant was held not sufficient to establish an independent contractor's status.

5. Although his hours of work were not prescribed by the company, it kept a close check on his efforts, activities and results.

6. He was free to sell products of other manufacturers but only at the risk of losing part of his sales territory or his job if such activities interfered with his sales' effort for the company.

7. No Social Security taxes were paid for him except during three months in 1937 and an additional three weeks just before he entered the service.

8. He was not referred to by the company as an independent contractor but always as a member of the company organization.

9. He received from the company frequent and detailed instructions and orders governing his activities.

10. His income depended solely upon commissions earned by his own sales' efforts and he had no opportunity for profit or loss in the business.

11. He maintained no office other than a desk, typewriter and filing cabinet in his own home.

The District Court carefully considered the criteria set out by this Court in *Brown v. Luster, supra,* and then said at page 80,013:

> "There are certain other facts which must be weighed if we are to follow the further standard of that case, that is that 'in each case all of the facts must be considered together.' "

B. The second case lays at rest the *state statute of limitations question* which was stressed by appellant as the

first point in its brief and upon which the United States filed its *amicus* brief herein.

This case is *Wintuft Corporation v. Fuquea* (20 C. C. H. Labor Cases, par. 66,567, not yet officially reported) decided by the Court of Appeals for the Fifth Circuit on October 19, 1951, affirming the District Court's decision (17 C. C. H. Labor Cases, par. 65,371).

Appellee is indebted to counsel for *amicus curiae* for the following statement regarding the *Wintuft* decision:

> "The Court of Appeals' opinion did not make it exactly clear what the decision was concerning the application of state statutes of limitations to the causes of action for reemployment or damages arising under Section 8 of the Selective Training and Service Act of 1940. *Amicus curiae* therefore obtained the transcript of record and the briefs of the parties in order to ascertain exactly what issue was determined in that case. The briefs and the record make it clear that the Court of Appeals held that state statutes of limitation are not applicable to an action arising under this statute.
>
> "The veteran, Fuquea, did not seek reinstatement but asked for damages only and the employer apparently had ceased operations at the time of the suit. In the District Court, the employer filed a 'plea of statute of limitations' stating that 'plaintiff's cause of action, if he had any, accrued more than twelve months next before the commencement of this suit.' [Wintuft record, 24]. Several subsequent pleas along the same line were also filed [Wintuft record, 25,

27]. The District Court overruled the motions for dismissal based on these pleas [Wintuft record, 23, 25, 29].

"These pleas did not make it quite clear that the employer was relying on a state statute of limitations. On appeal, however, the employer in his brief expressly relied on Georgia statutes of limitation, one of which established a one-year period and another of which established a two-year period (cited by the employer as Georgia Code, vol. 3, Sec. 704 (4360) and Georgia Code, vol. 3, p. 714 (4370)). The principal judicial authority cited by the employer was *Walsh v. Chicago Bridge and Iron Company,* 90 F. Supp. 322, which was examined in the briefs of the parties and *amicus curiae* here.

"On the basis of this contention, the Court of Appeals for the Fifth Circuit stated 'the defendant is here making three points against the charges: (1) That the action was barred by a state statute of limitations * * *. We cannot agree. The District Judge gave careful consideration to the asserted plea of limitation and to the facts of record. His judgment denying the defenses of limitation and laches was correct.'

"It is therefore apparent that the Court of Appeals for the Fifth Circuit has squarely held that state statutes of limitations do not apply in veterans' suits under this Act."

IV.

When All the Evidence Is Considered as a Whole, It Is Sufficient to Support the Trial Court's Conclusion That Appellee Was Not an Independent Contractor.

This Court in its decision (p. 5, Pernau-Walsh printing, footnote 3) cited the case of *Waggaman v. General Finance Co.* (C. A. 3), 116 F. 2d 252, which contains the following language at page 258:

> "At least it may be said that it is not clear that a master and servant relationship did not exist between the appellant and McWilliams. The question was therefore properly one for the jury. See Restatement of the Law, Agency, Sec. 220. On the record before us, it would be no less than a usurpation of the jury's province for the court to say as a matter of law, that a master and servant relationship did not exist between the appellant and McWilliams."

The nature of the relationship of employee or independent contractors is primarily a question of fact. The test, as in the case of other factual questions, is not what this Court would have found under the facts, but whether the finding of the trial court is supported by any substantial evidence, including reasonable inferences from that evidence. (*Washko v. Stewart,* 20 Cal. App. 2d 347, 349 (67 P. 2d 144); *Malvich v. Rockwell,* 91 Cal. App. 2d 463, 468 (205 P. 2d 389); *Pacific Lbr. Co. v. Industrial Acc. Com.,* 22 Cal. 2d 410, 422 (139 P. 2d 892); *Candido v. California Emp. etc. Com.,* 95 Cal. App. 2d 338, 340 (212 P. 2d 558).) "It is only where but one inference can reasonably be drawn from the evidence that the question of whether one is an employee or an independent contractor becomes one of law for the courts."

(*Burlingham v. Gray,* 22 Cal. 2d 87, 100 (137 P. 2d 9); to the same effect see *National Auto. etc. Co. v. Industrial Acc. Com.,* 80 Cal. App. 2d 769, 772 (182 P. 2d 634); *Perguica v. Industrial Acc. Com.,* 29 Cal. 2d 847, 859 (179 P. 2d 812).)

In *Walling v. Plymouth Mfg. Corp.* (C. A. 7, 1943), 139 F. 2d 178, Minton, J., held a finding that a manufacturing corporation was not an "employer" within the Fair Labor Standards Act was not so clearly erroneous as to justify interference by the reviewing court.

In *McCombs v. Robert W. Hunt Co.* (C. A. 7, 1949), 172 F. 2d 751, Minton, J., again held in a case under the Fair Labor Standards Act that a determination by the District Court that a senior inspector was an administrative "employee" was not clearly erroneous and would not be disturbed on appeal.

In *Smith v. Porter* (C. A. 8, 1944), 143 F. 2d 292, the finding of a judge sitting without a jury that certain foremen were "employed" in an executive capacity was one which would not be set aside on appeal unless clearly erroneous.

Where the construction given an instrument by the trial court appears to be consistent with the true intent of the parties as shown by the evidence, another interpretation will not be substituted on appeal although it might, without consideration of the evidence, seem equally tenable.

> *Johnson v. Landucci* (1942), 21 Cal. 2d 63, 69, 130 Pac. 405, 148 A. L. R. 1355.

The decision does not recite all of the facts found or the uncontroverted facts upon which the trial court concluded that appellee left a position in the employ of appellant and that his pre-war status with appellant was not

that of an independent contractor. This Court in its opinion (pp. 3-4, Pernau-Walsh printing) recites only a part of the facts stipulated and included within the findings.

It is submitted that this summary of the evidence by the Court presents only one side of the coin. Appellee therefore submits the following tabular summary to enable this Court to consider all the evidence before the trial court.

FACTS RECITED BY THIS COURT'S DECISION.	FACTS NOT RECITED IN THIS COURT'S DECISION.
Contracts and Nomenclatures.	
"Appellee sold merchandise for appellant in a specified territory under a written contract[2] which was terminable upon 30 days' written notice by either party." (Footnote 2—"although appellee had sold the products of appellant in the Kansas City territory for nine years prior to November, 1942, it was not until January 18, 1941, that the terms of their arrangement were reduced to a written contract. On December 8, 1941, appellant wrote to appellee proposing that the previous written contract	This is incorrect. Appellee's first contract [Ex. 7] was three years earlier. It is true that until 1938 appellee never had any written contract with Plomb [R. 39]. In the 1938 contract

FACTS RECITED BY THIS COURT'S DECISION.	FACTS NOT RECITED IN THIS COURT'S DECISION.
'under which you sell our tools as an independent contractor' be extended for a further period of one year. Appellee accepted this proposal in writing on December 16, 1941.")	[Ex. 7] he was denominated a "salesman"; in the 1939 contract [Ex. 8], he was a "representative."
"The written contract of the parties above referred to expressly provided that no employer-employee relationship was established by this writing, and the supplemental agreement of December 8, 1941, extending the previous written contract for another year referred to it as 'the contract * * * under which you sell our tools as an independent contractor. * * *.'"	There was no such stipulation against employee-employer relationship in the "salesman" contract of 1938 [Ex. 7] or the "representative" contract of January 1, 1939 [Ex. 8].
	Appellant corporation's relationship with appellee before he went to war was summarized at the trial as follows:
	"The Court: There was no change in the arrangement, so far as you know, from the time he first

FACTS RECITED BY THIS COURT'S DECISION.

FACTS NOT RECITED IN THIS COURT'S DECISION.

came into the company until he went into the service?

Mr. Pendelton: No." [R. 166.]

Mr. Pendelton, president of appellant corporation, was shown Exhibit 7 (the 1938 "salesman" contract) and Exhibit 8 (the 1939 "representative" contract) and he said:

"The use of 'salesman' in one case and 'representative' in the other case is purely a choice of words, and did not in any way alter the relationship between the company and Mr. Sanger." [R. 167.]

In 1939 and in subsequent years appellant consistently referred to appellee's status as being that of a salesman [Exs. 2, 3, 4, 5, 6, R. 36-37].

On February 20, 1940, the vice-president of appellant told Sanger that he was a "very 'top string' sales-

FACTS RECITED BY THIS COURT'S DECISION.

FACTS NOT RECITED IN THIS COURT'S DECISION.

man" [Ex. 12, R. 45] but he was cautioned to be a "good organization man."

On April 8, 1940, at a "Family Day Party," appellant conducted a presentation of service pins to Plomb Tool "employees" and appellee received one of these service pins [Ex. 13, R. 46, 184].

On April 10, 1940, appellant sent appellee a list of new jobbers in his territory in a letter addressed to all "salesmen" [Ex. 14, R. 46].

Shortly prior to September 9, 1942, appellant deducted money from appellee's commissions and used it for a donation to a clubhouse built for the employees of appellant. A letter from the president of the Plomb Employees' Association, dated September 9, 1942, stated that appellee's name was going to be on a plaque at the clubhouse [Ex. 17, R. 49, 183].

FACTS RECITED BY THIS COURT'S DECISION.

FACTS NOT RECITED IN THIS COURT'S DECISION.

In 1942 he was described to the United States Government by the president of appellant corporation as having been "district manager for Plomb Tool Company" for many years [Ex. 22, R. 52, 180.] On December 11, 1942, the chairman of the Board of Directors of appellant corporation also informed the Government that appellee "had been employed" by appellant for over ten years [Ex. 24, R. 55].

Appellee's letters written to appellant while appellee was in the service were published in appellant's house organ [Ex. 26, R. 55] and appellant wrote appellee on December 24, 1942 [Ex. 25, R. 55], and again on December 31, 1942, asking for a picture of him in his uniform to be printed in their house organ [Ex. 27, R. 56].

FACTS RECITED BY THIS COURT'S DECISION.	FACTS NOT RECITED IN THIS COURT'S DECISION.
Mode of Payment.	
"Appellee was paid on a commission basis."	
Activities in the Field.	
"He (appellee) solicited orders from whatever customers he selected and that he determined his own working hours, sales routes, and itineraries, using whatever selling techniques he desired."	Appellee was requested by appellant corporation to made reports concerning his itineraries but appellee did not follow any regular reporting plan as requested [Ex. 50, 6(e)]. Appellee corporation from time to time furnished appellee names and customers in his territory from whom appellant received inquiries and appellee reported to appellant regarding the same. [Ex. 50, 6(e).] From time to time appellant corporation requested appellee to report to it upon his activities in collecting past-due accounts. Appellant corporation had the final authority on extension of credit to customers [Ex. 50, 6(h); Ex. 4].

FACTS RECITED BY THIS COURT'S DECISION.

FACTS NOT RECITED IN THIS COURT'S DECISION.

Appellee made suggestions to appellant corporation to improve its sales [R. 84]. He assisted the designing of many special tools [Ex. 22, R. 181].

Appellee's duties even included repair and maintenance work. He testified as follows:

> "It was up to me as a salesman to keep that board in repair and clean. In other words, about once or twice a year, depending on the dust storms we had, all the tools would have to come down, those boards be washed and wiped off, sometimes revarnished and new brackets for new numbers of tools that were manufactured be installed on those boards." [R. 102.]

Appellee did this work and was furnished a complete tool kit with varnish and paint and brackets by appellant corporation. He

FACTS RECITED BY THIS COURT'S DECISION.	FACTS NOT RECITED IN THIS COURT'S DECISION.
	was given another kit to repair broken tools that the jobbers would give him on regular calls [R. 102].
Other Lines.	
"Appellee was permitted to, and did, represent other manufacturers and for the two-year period immediately prior to his entry into the armed services some 43% of his gross income was derived from sales activities on behalf of other manufacturers."	It was appellant corporation, not appellee, who made the original arrangement whereby appellee would carry the lines of other manufacturers [R. 31]. This arrangement was in line with industry practice. Morris Pendleton, president of appellant corporation, testified at the trial as follows: "When companies are small and their sales volume is small, it is very common in the tool business of various sorts for sales to come through manufacturers' agents; and, as a matter of neighborliness, if several companies have a territory in which they want representation, for them to jointly use the same person to represent them." [R. 164.]

FACTS RECITED BY THIS COURT'S DECISION.	FACTS NOT RECITED IN THIS COURT'S DECISION.
Payment of Expenses.	
"He (appellee) paid his own expenses."	In December, 1939, appellant corporation paid appellee's expenses to attend a sales meeting in Los Angeles [R. 44].
	Appellant corporation paid appellee $30.00 in January, 1941, in partial reimbursement of his expenses in attending an Automotive Service Industry convention [Ex. 50, 6(d)].
Equipment Furnished.	
	Appellant corporation made its own display truck available to appellee and paid him $200 in December, 1941, for repairs and tires for said truck [Ex. 50, 6(d)].
	Appellant corporation furnished appellee stationery with its name on it [R. 85].

FACTS RECITED BY THIS COURT'S DECISION.	FACTS NOT RECITED IN THIS COURT'S DECISION.
Payment of Assistant.	
"(Appellee) paid an assistant with his own monies and this assistant acted pursuant to his (appellee's) instructions."	(The veteran paid his assistants in *King v. S. W. Greyhound,* C. A. 10, 169 F. 2d 497, cert. den. 345 U. S. 891. Nevertheless, the appellate court reversed a district court decision which held the veteran to be an independent contractor.)
Sales Quotas.	
"Appellee was not required to meet sales quotas."	Appellee received a Hamilton watch as the winner of the 1938 sales contest conducted by appellant corporation [Exs. 9 and 10].
	Appellee brought in every account in his territory except one and built up his sales volume every year [Ex. 31, R. 65].
Office Space.	
"Nor was he (appellee) furnished an office by the appellant corporation."	Appellee always kept on the road; he never had a desk since 1932. He merely used a mail forwarding

FACTS RECITED BY THIS COURT'S DECISION.	FACTS NOT RECITED IN THIS COURT'S DECISION.
	service from the warehouse where the appellant's stock was carried [R. 79]. Appellee never paid for an office in his life. All he had was mail forwarding; he never had a chair, desk, or anything like an office [R. 82, 102].
Social Security Taxes.	
"No deductions were taken from his (appellee's) commissions on account of Social Security taxes, Old Age benefits, or Unemployment Insurance."	

While the trial Court found that all of the factual matters alleged in the pre-trial stipulation were true it did not find that these were the ONLY facts produced in evidence before the trial Court, the stipulation being subject "to the right of either party to introduce at the trial of this action other evidence not inconsistent with the facts herein stipulated." If this Court is dissatisfied with the sufficiency of the findings of the trial Court, it is,

of course, within its power to reverse the judgment and remand with directions to make and state expressly and more explicitly further findings of fact and conclusions of law.

3A Ohlinger's Federal Practice 204;

Mayo v. Lakeland (1940), 309 U. S. 310, 317;

National Popsicle Corp. v. Icyclair, Inc. (C. A. 9, 1941), 119 F. 2d 799;

Paramount Pest Control Service v. Brewer (C. A. 9, 1948), 170 F. 2d 553; (1949) 177 F. 2d 564;

Marlborough Corp. v. U. S. (C. A. 9, 1949), 172 F. 2d 787, opinion by Mathews, J.;

Gillis v. Gillette (C. A. 9, 1949), 177 F. 2d 7, opinion by Bone, J.;

Times-Mirror Co. v. N.L.R.B. (1947), 331 U. S. 789.

The petition for rehearing should be granted.

Respectfully submitted,

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Certificate of Counsel

I am one of the attorneys for the appellee. It is my judgment that this Petition for Rehearing is well founded and not interposed for delay.

ROBERT W. KENNY.